Before the
Federal Communications Commission,

In the Matter of	)	
	)	
Petition for Declaratory Ruling that AT&T's	)	WC Docket Non. 02-361,
Phone-to-Phone IP Telephony Services are	)	
Exempt from Access Charges,	)	

THE TEXAS OFFICE OF PUBLIC UTILITY COUNSEL
THE CONSUMER FEDERATION OF AMERICA
CONSUMERS UNION

January 18, 2003.

RECOMMENDATION OF JOINT CONSUMER COMMENTERS

Individually and, in many recent instances, jointly the Texas Office of Public Utility Council (Texas OPC),[1] the Consumer Federation of American[2] and Consumers Union[3] have participated in virtually all of the proceedings conducted by the Commission of the past several decades dealing with access charges. We respectfully recommend that the Commission deny AT&T's petition in the instant proceeding, but commence a larger proceeding to rationalize cost recovery in the federal jurisdiction.

When the Telecommunications Act of 1996 was signed, instead of talking about new technologies, vigorous competition, and consumer savings, it would have been more appropriate for the President to say

Let the games begin!

Over the past seven years, every major segment of the industry, new and old, has spent an immense amount of time scheming to game the complex regulatory process that the Act created. The FCC has added fuel to the fire with tentative and some times temporary rules, distorted definitions and occasionally idiosyncratic readings of the Act.

It is time for the Federal Communications Commission to put an end to the gaming.

[1] The Texas Office of Public Utility Counsel (Texas OPC) is the state consumer agency designated by law to represent residential and small business consumer interests of Texas. Texas Utilities Code §§ 13.001-13.063. The agency represents over 8 million Texas residential customers and advocates consumer interests before Texas and Federal regulatory agencies as well as State and Federal courts.

[2] The Consumer Federation of America (CFA) is the nation's largest consumer advocacy group, composed of two hundred and eighty state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power and cooperative organizations, with more than fifty million individual members. CFA is online at www.consumerfed.org.

[3] Consumers Union (CU), publisher of Consumer Reports, is an independent, nonprofit testing and information organization serving only consumers. CU is online at www.consumersunion.org.

The Commission should establish a reasonable and fair compensation scheme for use of the telecommunications network, as it has done with TELRIC pricing of unbundled network elements. The FCC should simplify and unify the various proceedings it has ongoing so that it can establish a rational approach to cost recovery in the Federal jurisdiction and take the fun and profit out of gamming the system. Once it does so, it will discover that competition follows, as it has with the final resolution of challenges to its TELRIC methodology and the vigorous implementation of TELRIC-based unbundled network element pricing by the state.

Denial of the AT&T Petition for a declaratory ruling that its "limited IP Telephony"[4] is an information service is the perfect way to start the process of rationalizing cost recovery in the federal jurisdiction. The AT&T petition is based on a series of fundamentally flawed claims and assertions that are inconsistent with the Telecom Act and sound public policy.

AT&T'S REGULATORY GAME

AT&T's new service is easy to describe because it is virtually identical to its old service. It is exactly the same service that has been in place since the separation of the local and long distance lines of business (see Exhibit 1). A long distance telephone call originated on a local network is routed through the local network to AT&T's point of presence [POP] using a circuit switched protocol – SS-7. It is then carrier over AT&T proprietary interstate network to AT&T's point of presence close the called party, where it is routed to the called

[4] "Joint Comments of the American Internet Service Providers Assocation, The California Internet Service Providers Association, the Connecticut ISP Association, Inc., Grande Communications, Inc., The New Mexico Internet Professional Association, Pulver.Com, US Datanet Corporation," *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-toPhone IP Telephony Services are Exempt from Access Charges,* Federal Communications Commission, WC Docket Non. 02-361, December 18, 2002, p. 5, describes AT&T's service this way, which is actually too generous from the point of view of real internet services.

party using circuit switched, SS-7 protocols. AT&T used to use SS-7 in its interstate network. It now claims to be switching to an Internet switched protocol on its network. So when it receives the call from the local switch at the POP, it converts it to Internet switching and uses that to route the call to the destination POP. It converts the call back to SS-7 and hands it off to the local carrier. It uses the local network at both ends in exactly the same was as it did before it made the protocol conversion.

THE MISDEFINITION OF THE SERVICE

AT&T asks the Commission to declare a service that is clearly a telecommunications service as an information service. This service fits the definition of a telecommunications perfectly. It involves the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form of content of the information as sent and received. It is a service, because AT&T is offering "telecommunications for a fee directly to the public."

It is not an information service. The fact that it uses a different protocol to direct the transmission between the two points does not make it an information service. Indeed, it has none of the characteristics of an information service. It is just a network management protocol change and network management is explicitly excluded from the definition of an information service. The Act defines an information service as

> [T]he offering of a capability for generating, acquiring, storing transforming, processing, retrieving, utilizing or making available information view telecommunications, and include electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

In simple terms, this is just a phone call and if the commission were to declare it an information service, the entire category of telecommunications would be rendered null and void. AT&T's entire long distance business would soon be an information service, not a telecommunications service simply because it changed the protocol it uses to manage its proprietary network. While the Act has been criticized for a lack of clarity in many areas, on this point there is no doubt. The FCC cannot classify this as an information service.

THE BOGUS CLAIM FOR A FREE RIDE

AT&T claims that the service, however it is defined, merits a free ride on the local network because it is an Internet service and Internet services are nascent. Unfortunately for AT&T it does not appear that the Internet is involved in the service in any way.

AT&T does not state, nor does it appear from any evidence entered into the record, that any of the data involved in this service ever transverses the Internet. All that AT&T has done is to apply Internet protocol switching to manage some traffic on its proprietary interstate network. The fact that that interstate network also carries Internet traffic is irrelevant. The essence of the Internet is the exchange of traffic between networks (the name internet derives from interconnect networks). Indeed, one of the most important characteristics of the Internet was that it is designed to be entirely indifferent to how data was handled within the networks that are interconnected. For AT&T to apply the term Internet to this service is a fundamental distortion. Even the ISPs, who very much want the free ride that AT&T is advocating, could only bring themselves to call it a "limited IP –Technology.

Even if this were an internet-based telephone service in some manner (which it is not) it is hard to argue that it needs a nascent industry free ride. The commercial Internet has been

thriving for well over a decade. It one of the strongest sectors of the economy and it uses and relies on the public switched network for the vast bulk of its activities. Indeed, it has recently been suggested that the word Internet no longer be capitalized, because the phenomenon has become so deeply embedded in out society.

If the Commission is going to dispense subsidies for internet-based telephony, this would appear to be a very uninviting candidate. AT&T's position appears to be that this approach to routing its calls over its own networks cannot prove itself by economizing on some portion of the 80 percent of costs that are not under commission jurisdiction. It needs the free ride to be economic.

Moreover, allowing AT&T to have a free ride on the local network violates the simple, yet critical principle, which we have consistently advocated before the Commission and which has been a cornerstone of consumer advocacy in telecommunications for decades that everyone who uses a facility should pay for that use. AT&T asks for a free ride on the local exchange network, even though this service uses that network in exactly the same manner as its traditional long distance service.

A fair price for the actual use of the network is not a tax on the internet; it is a user fee that helps to keep the network up and running. Allowing AT&T to have free use of local facilities would constitute an explicit subsidy of AT&T (and other long distance carriers who adopt this artifact to get a free ride) and we have no doubt that residential consumers would be the ones who are forced to make up the difference.

DIFFERENCES AND DISCRIMINATION

The legal and procedural grounds on which AT&T has based its claim for a declaratory order are feeble at best. Most disturbing is the claim that treating voice traffic differently than data traffic is undue discrimination. In so doing, AT&T asks the Commission to abandon the technology neutral policy it has adopted, in which services are defined by their use and functionality, not by the technologies they employ. As Exhibit 2 shows, AT&T claims that the distinction between computer and IP-voice is an invidious distinction, not tolerated by the Act. It can be argued, much more convincingly that the distinction between IP-voice and traditional voice introduces an invidious distinction that is not tolerated by the Act.

OTHER PUBLIC POLICY ARGUMENTS

The other public policy arguments put forward in favor of a declaratory order are not compelling.

The argument that failing to issue a declaratory ruling will harm new nascent technologies ignores reality. CLECs and ISPs who make this argument have simply not learned from experience. A declaratory ruling that rests on so many erroneous arguments is certain to be challenged in court. It may or may not be stayed, but investment decisions will be delayed until the legal challenge has been cleared up. In the long run, we are convinced the declaratory order will be overturned and the industry will be back where it started.

The claim that the Commission should foster nascent internet technologies with cross-subsidies (uncompensated use of the local network) is not very convincing in this case. This case also fractures the commission's commitment to technological neutrality. If the commission creates this loophole to avoid access charges, other major IXCs with significant fiber networks will switch protocols to avoid access charges, while still avoiding the sending the traffic out to the internet. The local network will still be used (and necessary) to complete every call in exactly the same way; it just will not be paid for. Charging a reasonable amount for the use of the network on a technologically neutral basis is a much sounder basis on which to promote technology deployment and it eliminates selection of technology based on gaming of the regulatory system.

We are well aware that true internet services make contributions to the support of the local network and the debates about whether there are subsidies. This particular service is a blatant attempt to misapply various definitions to get a free ride for a traditional service. It devalues the use of the word internet and weakens the claim for special treatment.

We also believe that the local exchange companies acted unilaterally in imposing fees on these services. Perhaps they should have sought the declaratory ruling. Notwithstanding the finger pointing about the withdrawn U.S. West petition, there is no dispositive procedural record that compels the commission to take a particular course of action. It should more quickly rationalize the various access charge proceedings based on the principle that users should pay for their facilities that they use in the provision of their services.

There is not justification for the Commission to preempt the state authority over intrastate access charges.

EXHIBIT 1: AT&T'S EXTREMELY LIMITED IP-TELEPHONY SCHEME FOR AVOIDING ACCESS CHARGES

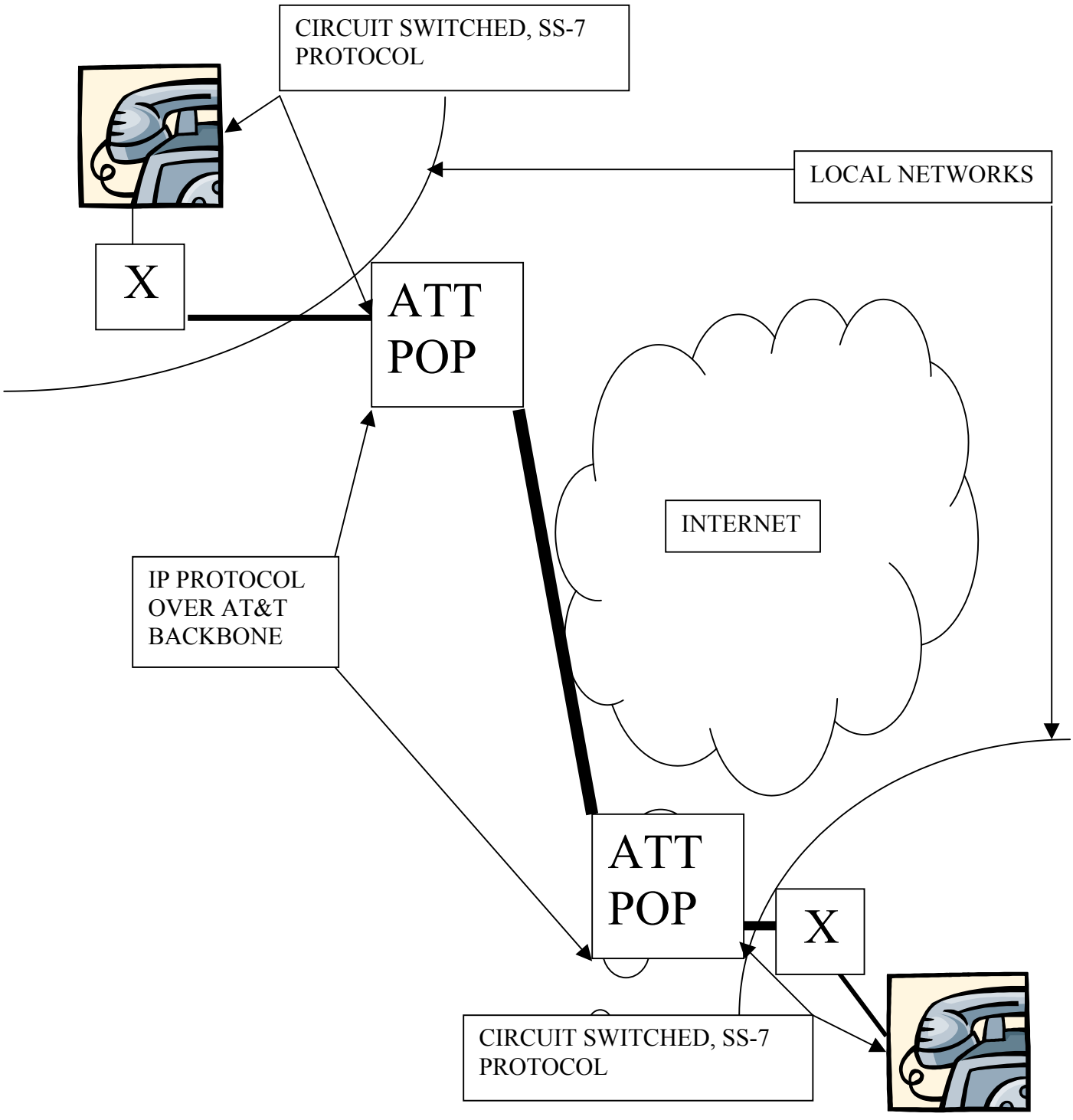

EXHIBIT 2: WHICH DISTINCTION IS UNDUE DISCRIMINATION?